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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 532

MRS. ROBERT LEE TURMAN AND CULLEN B. GOSNELL,

Appellants,

vs.

J. LON DUCKWORTH, AS CHAIRMAN OF THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 3013

MRS. ROBERT LEE TURMAN AND CULLEN B. GOSNELL,

Plaintiffs,

vs.

J. LON DUCKWORTH, AS CHAIRMAN GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE; MISS GRACE CANNINGTON, AS SECRETARY GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE; THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF THE STATE OF GEORGIA; BEN. W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA,

Defendants.

STATEMENT OF APPELLEES OF MATTERS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

MOTION TO DISMISS OR AFFIRM

Now come the appellees, pursuant to Rule 12 of the Supreme Court of the United States, within fifteen days from the service of the notice of appeal and appellants' statement as to jurisdiction, and file this their statement of

matters making against the jurisdiction of the Supreme Court of the United States to review the order or decree appealed from, and, as a part thereof, their motion to dismiss or affirm, and show:

1. The record fails to present a substantial federal question. The complaint attacked as violative of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, a law of the State of Georgia establishing a county unit system for nominating party candidates for State offices. The gist of the law is that if any political party shall elect to hold a party primary to nominate candidates for State offices, the candidate receiving the greatest number of votes in any county shall be deemed to have carried that county and shall be entitled to the "unit" vote of such county in determining the nominee. Each county has two unit votes for each member in the lower House of the General Assembly. Representation in the General Assembly is fixed by the State Constitution. To be nominated for Governor, a candidate must receive a majority of all the county unit votes. If no candidate receives a majority of the county unit votes, a second primary, or run-off, between the two highest candidates is held. The candidate receiving the majority of the county unit votes in the second primary is entitled to the nomination. If they are tied in unit votes (which is possible only if the vote in one or more counties is equally divided) the one having the greatest popular vote is the nominee. With respect to offices other than Governor and United States Senator, a plurality of county unit votes nominates.

Appellants complain that the primary law deprives them of equal protection of the law, in violation of the Fourteenth Amendment, because they live and vote in populous counties, in which a heavy vote was polled in the primary

of July 17, 1946, but that each of these counties has only six unit votes, whereas other counties with disproportionately less voters and disproportionately less population, have two unit votes.

The primary was held July 17, 1946. In the primary a candidate for Governor carried 105 counties of a total of 159 and received a substantial majority of all the county unit votes (242 of a total of 410) but less than a plurality of the popular vote. Appellants voted for another candidate who received a plurality of the popular vote (313,389 as against 297,245 for the successful candidate), but did not receive a majority of the popular vote (other candidates received 81,247 popular votes) and had only 146 unit votes of the total of 410. Of the total popular vote received by the candidate of appellants, 76,816 were in the two counties in which appellants live. Outside of these counties, the successful candidate, under the county unit plan, received 32,075 more votes than the candidate of appellants.

The original complaint sought to enjoin the Chairman and Secretary of the State Democratic Executive Committee from certifying the successful candidate under the county unit rule as the Democratic nominee for Governor.

But the complaint was filed August 8, 1946, after this certification had been made to the Secretary of State on August 5, 1946.

The Georgia law requires that candidates for State offices qualify with the Secretary of State in person, or through the proper authorities of the party nominating them, ninety days before the general election, which is to be held this year on November 5th. The certification of the Democratic candidate for Governor was filed one day before the time would have expired.

The original complaint also sought to enjoin the Secretary of State from furnishing the official ballot to the ordinaries of the various counties.[1]

The Georgia law requires the Secretary of State to furnish these ballot forms to the ordinaries in sufficient time for the ordinaries to have ballots printed at least seventy (70) days before the general election.

No restraining order was granted upon the filing of the original complaint.

The Secretary of State mailed the ballot forms out to the ordinaries on August 12, 1946, just fourteen days before the expiration of the period within which the ordinaries were required to have all the ballots printed and ready for distribution.

Appellants amended or sought to amend their original complaint. The amendment alleged that since the filing of the original complaint the time within which candidates might qualify to be voted on in the general election of November 5, 1946, had expired (in fact, the time had expired August 6th, before the complaint was filed on August 8th) and the only candidate who had been qualified was the Democratic nominee under the county unit system. They prayed that if the Secretary of State had prepared and distributed the official ballot for the November general election and that election should be held with the name of the candidate nominated under the county unit system as the only Democratic candidate for Governor entered on the ballot, the Secretary of State be enjoined from causing the returns of the general election for Governor to be laid before the General Assembly when it meets.

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[1] The ordinary is a constitutional county officer, who supervises general elections, appoints the managers at each county precinct, and has the duty of providing all necessary forms. He has the ballots printed following the form sent to him by the Secretary of State as to state offices and adding, on the same ballot, candidates for local offices.

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The cause was heard before a three-judge District Court on August 16, 1946. An order denying an interlocutory injunction was entered August 24, 1946, and filed August 26, 1946.

Appellees contend that no substantial federal question is involved because the right of the appellants to vote in a primary for the nomination of party candidates for State offices does not arise under the Constitution and laws of the United States, but under the laws of the State. Cases believed to sustain this contention are:

Minor v. *Happersett*, 21 Wall. 162, 170; 33 L. Ed. 627, 629;

Ex parte Zarbrough, 110 U. S. 651, 664, 665, 28 L. Ed. 274, 275;

McPherson v. *Blocker*, 148 U. S. 1, 37, 38, 36 L. Ed. 869, 878;

Guinn v. *United States*, 238 U. S. 347, 59 L. Ed. 1340, 1346;

Breedlove v. *Suttles*, 302 U. S. 277, 82 L. Ed. 252, 256.

2. The rights asserted by the appellants are purely political, and the questions involved are purely political questions. Whether or not the complaint presents a justiciable controversy, equity is without jurisdiction to enforce a purely political right. This is especially true of federal courts of equity.

Cases sustaining this contention are:

In re: Sawyer, 124 U. S. 200, 31 L. Ed. 402;

Walton v. *House of Representatives*, 265 U. S. 490, 68 L. Ed. 1116;

Taylor v. *Beckham*, 178 U. S. 548, 570, 44 L. Ed. 1187, 1195;

Giles v. *Harris*, 189 U. S. 475, 47 L. Ed. 909;

Lane v. *Wilson*, 307 U. S. 268, 83 L. Ed. 1281;

Colegrove v. *Green*, —— U. S. ——, 90 L. Ed. 1242.

The rule that a federal court of equity is without jurisdiction of political questions, or to enforce political rights, is so firmly established that the Supreme Court ought not to allow an appeal presenting such a question.

The amendment of appellants, hereinafter referred to, but emphasizes the political nature of the questions presented.

3. No effective relief could now be granted to appellants by this Court or by the trial court, because the only prayer left in the complaint relates to a subject-matter of which the federal courts are without jurisdiction and seeks relief they are without power to grant.

All of the questions presented by the original complaint were moot at the time of the hearing before the statutory three-judge court. The original complaint sought to enjoin the Chairman and Secretary of the State Democratic Executive Committee from certifying the result of the July 17th primary to the Secretary of State. This certification had been made on August 5, 1946, and the complaint was filed August 8, 1946. Manifestly the court could not restrain an act which had been done before the suit was filed.

The complaint also sought to enjoin the Secretary of State from sending out the ballot forms to the ordinaries. This had been done, as required by a state law which is concededly valid, when the case was heard.

Consequently every question presented by the original complaint had become moot in the trial court and is now moot. No relief can be granted appellants with respect to these questions.

Mills v. *Green*, 159 U. S. 659, 40 L. Ed. 293;

Blackman v. *Stone*, 17 Fed. Supp. 102, 300 U. S. 641, 81 L. Ed. 856;

Jones v. *Montagu*, 194 U. S. 147, 48 L. Ed. 913.

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The only thing left in the case is the prayer of the amendment which seeks to enjoin the Secretary of State from laying before the General Assembly at its next session the returns of the general election for Governor to be held November 5, 1946.[2]

The complaint, in so far as it proceeded against the Secretary of State, is in purpose and effect a suit against the State of Georgia. He is sued in his official capacity. It is not alleged that the Secretary of State is proceeding under any law alleged to be unconstitutional or in an unconstitutional manner under a valid law. The Primary Act of 1917, which alone is alleged to be unconstitutional, imposes no duty upon the Secretary of State. In receiving certifications of nominees of parties or notices of candidacy of other candidates, he does not act under the Act of 1917, but under other statutes which are not challenged. He has no duty to determine the validity or propriety of the certification by the proper officials of a party, and no duty to determine any controversy with respect thereto, save in a case where two or more persons seek to qualify as nominee of the same party. In that case, he is to determine the issue, but such is not the case here.

The duty of the Secretary of State to lay before the Senate the returns of the general election for Governor arises under the Constitution of Georgia, which is not attacked, but is admittedly valid. In so acting, the Secretary of State is the mere agent of the General Assembly. The election managers seal the returns and send them to the Secretary of State, addressed to the President of the Senate and Speaker of the House of Representatives. The

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[2] The amendment was filed before the hearing, but was never allowed. At the hearing appellees objected to the amendment. The objections were heard and decision reserved. There having been no ruling on the amendment in the court below, questions presented by it are not before the Supreme Court for determination.

Secretary of State retains the returns, without opening them, and must cause them to be laid before the Senate at its next session, in order that the two houses of the General Assembly in joint session may open and publish the returns and declare the result. If, as a result of the election, no candidate receives a majority of the votes cast, then the General Assembly elects a Governor from the two highest, a majority of the members present being necessary to a choice. Incidentally this election is under the "County Unit" Plan.[3]

In so far as the complaint proceeds against the Secretary of State, both with respect to the relief sought in the original complaint and that sought in the amendment, it is in purpose and effect a suit against the State, because the Secretary of State, in all that he has done or may do acts under valid State laws, which are not attacked, and therefore represents the State in action and liability. See in this connection:

In re: Ayers, 123 U. S. 443, 31 L. ed. 216;
Louisiana v. *Jumel,* 170 U. S. 711, 27 L. ed. 448;
Antoni v. *Greenhow,* 107 U. S. 760, 27 L. ed. 468;
Cunningham v. *Macon & Brunswick R. R.,* 109 U. S. 446, 27 L. ed. 992;
Hagood v. *Southern,* 117 U. S. 52, 29 L. ed. 805;
Pennoyer v. *McConnaughy,* 140 U. S. 1, 35 L. ed. 363;
Cargile v. *New York Trust Co.,* 67 F. (2) 585;
New York Trust Co. v. *Cargile,* 292 U. S. 625, 78 L. ed. 148;
Ex Parte State of New York, 256 U. S. 490, 65 L. ed. 1057;

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[3] The eight most populous counties each have three representatives, the thirty next most populous have two representatives each, and the rest of the counties each have one. The county unit vote of each county, under the primary law, is two for each representative.

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Worchester Trust Co. v. *Riley*, 302 U. S. 292, 82 L. ed. 268.

The State is an indispensable party to enable a federal court to grant the relief sought by the amendment, for it is against the State itself that the decree would operate. The State has not consented to be sued, and the Court should, for that reason, decline jurisdiction.

Missouri v. *Fiske*, 290 U. S. 18, 27 L. ed. 145, 150;
Monaco v. *Mississippi*, 292 U. S. 313, 78 L. ed. 1282.

In so far as the complaint seeks to enjoin the Secretary of State from laying the returns of the general election for Governor before the General Assembly, it does not present a justiciable controversy, but calls for the judgment of the court upon purely political questions.

Georgia v. *Stanton*, 6 Wall. 50, 18 L. ed. 721;
Taylor v. *Beckham*, 178 U. S. 549, 44 L. ed. 1187;
Cherokee Nation v. *Georgia*, 5 Pet. 1.

In so far as the complaint seeks to restrain the Secretary of State from laying the returns of the general election before the General Assembly, it seeks, in purpose and effect, to control the action of the General Assembly of Georgia, which is not a party to the suit and cannot be made a party.

The managers of the general election, who conduct it, under the supervision and by appointment of the ordinaries, and the General Assembly, which ascertains and declares the result, are the real actors and representatives of the people with respect to the general election. The duties of the Secretary of State are purely clerical. He is a mere repository of the returns until the legislature meets. The General Assembly cannot be restrained by enjoining him.

Generic v. *Rutter*, 265 U. S. 388, 68 L. ed. 1068.

We had as well try to keep the Court from considering a case by enjoining the Clerk from laying the record before it.

4. The declaratory relief prayed for cannot be granted, because the case is not one appropriate for the grant of equitable relief.

Great Lakes Dredge & Dock Co. v. *Huffman*, 319 U. S. 293, 87 L. ed. 1407;
Colegrove v. *Green, supra.*

WHEREFORE, appellees respectfully submit this statement, showing that the questions upon which the decision of this Court depend are so unsubstantial as not to need further argument or further consideration of this Court, and appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment by the District Court of the United States for the Northern District of Georgia.

This, September 26, 1946.

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